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No. 06-201

IN THE

Supreme Court of the United States

EL PASO TENNESSEE PIPELINE CO.,
Petitioner,

v.

GLADYS YOLTON, WILBUR MONTGOMERY, ELSIE TEAS, ROBERT BETKER, EDWARD MAYNARD, GARY HALSTED AND CNH AMERICA LLC,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court should decline to review the interlocutory decision of the Sixth Circuit which involves the application of traditional principles of contract interpretation in a Section 301 breach of contract action.

II. Whether this Court should decline to review the interlocutory decision when there is no disagreement among the Circuits as to the basic principles of contract interpretation applicable to a Section 301 breach of contract action for retiree health care benefits.

PARTIES TO THE BRIEF

This Brief in Opposition is filed by Respondents Gladys Yolton, Wilbur Montgomery, Elsie Teas, Robert Betker, Edward Maynard, Gary Halsted. In this Brief, these Respondents are referred to as the Plaintiffs.

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STATEMENT OF THE CASE

A. The Collective Bargaining Agreements

Beginning in 1970, Tenneco Corporation (now El Paso) was the parent and sole shareholder of Case Corporation (now CNH America LLC), a manufacturer of farm and construction equipment.[1] Pet. 2a.

[1] Case was known as J.I. Case Company prior to 1990 when it changed its name to Case Corporation. Pet. App. 40a. In 2004, Case changed its name to CNH America LLC.

Case and the UAW were parties to a series of collective bargaining agreements (CBAs) which included Group Insurance Plans (GIPs) addressing benefits for various categories of employees as well as retirees and their surviving spouses. Pet. App. 3a.

In 1971, Case agreed to pay the entire cost of health care benefits for retirees and surviving spouses over age 65 beginning January 1, 1972. Pet. App. 42a. The GIPs contained a section entitled: "Provisions Applicable to Employees Retired on Company Pension and Surviving Spouses Receiving Company Pension." That section provided that Case "shall pay the full premium cost of [health care] coverages" for "Employees who retire under the J I Case Pension Plan for Hourly Paid Employees, or their surviving spouses eligible to receive a spouse's pension under the provisions of that Plan . . . ." Pet. App. 41a-42a.

In a December 30, 1971 letter, Case's Benefits Manager explained these benefits to retirees: "Retirees and Surviving Spouses, age 65 or older, are not required to pay a premium, either for themselves or any dependent. Instead, the coverage shall be fully paid by the Company." In response to the question: "Will my spouse be able to keep this coverage if I pass away?" he answered: "*If you have elected the Spouse's Optional Form of Pension and your spouse will receive a pension as a result, your spouse will be able to keep this coverage for the remainder of her lifetime. . . .*" (emphasis added). Pet. App. 58a.

In the 1974 negotiations, Case extended fully paid coverage to retirees and surviving spouses regardless of age. The language of the GIPs relating to retiree health care benefits remained substantially unchanged from 1974 to 1990. Pet. App. 42a.

In 1987, Case and the UAW negotiated a Plant Shutdown Agreement for the Rock Island, Bettendorf and Terre Haute

plants. The Shutdown Agreement provided enhanced retirement options which included retiree health care benefits. The Shutdown Agreement described "hospitalization/medical insurance" (as well as retiree life insurance and pensions) as "vested residual rights." Pet. App. 43a.

The CBA, at Article XVI, Section 4 contained the following two provisions:

> 4A. The insurance plan agreed to between the parties will run concurrently with this Agreement and is hereby made part of this Agreement.
>
> . . .
>
> 4C. The pension plan agreed to between the parties will run concurrently with this Agreement and is hereby made part of this Agreement. Pet. App. 3a.

Case's benefit representatives at the various plants consistently informed retirees verbally and in writing that they would have unchanged, fully paid health care benefits for their lifetimes and that their surviving spouses would also have lifetime health care benefits. Pet. App. 57a-60a.

On November 5, 1993, Case Corporation and the UAW initialed an Extension Agreement to extend the 1990 CBA through February 5, 1995. Section 9 of the Extension Agreement, entitled "FAS 106 Out-Year Cost Limiters,"[2] refers to a "Letter of Agreement" that the cost to the company of providing benefits to retirees after April 1, 1998 would not exceed a specified dollar amount. Pet. App. 44a-45a.

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[2] FAS 106 is an accounting standard promulgated by the Financial Accounting Standards Board requiring companies to report post-retirement health care obligations on their financial statements on an accrual basis. Companies used various methods to reduce the FAS 106 figure. *See* Ossi, *It Doesn't Add Up: The Broken Promises of Lifetime Health Benefits, Medicare and Account-ing Rule FAS 106 Do Not Equal Satisfactory Medical Coverage for Retirees*, 13 J. of Contemp. Health L. & Policy 233 (1996).

B. The Reorganization

In 1994, Case Corporation was a still wholly owned subsidiary of Tenneco Corporation. Pet. App. 40a. In early 1994, Tenneco's Board of Director's decided to "reorganize" to facilitate a public offering of its "equity interests in Tenneco's farm and construction equipment business . . ." (defined as the "Case Business"). CNH Pet. App. 82a.[3] The Reorganization Agreement was between Tenneco, Case Corporation and a new corporation (Case Equipment Corporation) that Tenneco incorporated for that purpose. Pet. App. 2a-3a, 45a-47a. Tenneco assigned all of the Case Business to Case Equipment except for Tenneco's ownership of Case stock, certain demand notes and subordinated debt and certain Retained Assets and the Retained Liabilities. Pet. App. 2a-3a. In the Employee Benefit and Compensation Allocation Agreement, ("Allocation Agreement"), Tenneco assumed Case's post-retirement health and life insurance obligations (the "Retained Liabilities") for pre-reorganization retirees. Case Equipment "assumed" the existing CBAs including the 1990 CBA under which many Plaintiffs retired. Pet. App. 5a-6a, CNH Pet. App. 84a.

At 12:01 a.m. on July 1, 1994, Case Corporation changed its name to Tenneco Equipment Corporation. One minute later, Case Equipment Corporation changed its name to Case Corporation. CNH Pet. App. 83a. Thereafter, Tenneco began paying the full cost of the plaintiff's health care benefits. Pet. App. 6a.

C. The Dispute

In 1996, Tenneco merged with El Paso. Pet App. 47a. In October 1997, El Paso notified retirees that they had to pay

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[3] El Paso did not include the district court's post- December 31, 2003 orders in its Appendix. As to these orders, Plaintiffs will cite to CNH's Petition Appendix as CNH Pet. App. __.

$56 a month for their health care coverage beginning April 1, 1998. Pet. App. 7a. In November 1997, Case Corporation notified retirees and surviving spouses that it would pay this contribution through the end of 1998. Pet. App. 49a. During the 1998 negotiations with the UAW, Case Corporation agreed to fund a VEBA trust to pay health care contributions for pre-reorganization retirees. Pet. App. 49a. In August 2002, when VEBA funds were exhausted, El Paso informed retirees that they would have to pay $290 per month for their health care benefits. Pet. App. 49a. In October 2002, Plaintiffs sued Case and El Paso. Pet. App. 49a.

In September 2002, Case Corporation changed its name to Case, LLC. Pet. App. 40a. In January 2004, Case, LLC changed its name to CNH America LLC. CNH Pet. App. 91a.

D. The District Court's Preliminary Injunction

On December 31, 2003, the district court granted Plaintiffs' motion for preliminary injunction. It concluded that, based on the express language of the GIP, retirees were entitled to lifetime health care benefits. Pet. App. 53a-57a. The court then found that "[e]ven if the parties' intent were not clear based on the express language of the various labor agreements," there was substantial extrinsic evidence confirming Case's intent to provide fully paid lifetime health care benefits. Pet. App. 57a-60a. The court further concluded that El Paso, as Tenneco's successor, had assumed Case's obligation to provide the benefits. CNH Pet. App. 67a-69a.

On March 9, 2004, the court granted El Paso's motion for reconsideration, concluding that it had "overlook[ed] the fact that, as the signatory to the CBAs, Case LLC retained liability for Plaintiffs' health care costs despite El Paso's subsequent assumption of those liabilities . . . ." CNH Pet. App. 80a. On September 3, 2004, the district court granted summary judgment for CNH on its indemnity cross-claim against El Paso. Pet. App. 30a.

E. The Sixth Circuit's Decision on Interlocutory Appeal

On January 17, 2006, the Sixth Circuit affirmed, concluding that the district court had not abused its discretion in issuing the preliminary injunction. The Sixth Circuit also affirmed the March 9, 2004 decision that Case was directly liable to the retirees and the September 3, 2004 decision granting summary judgment for Case on its indemnification cross claim.

REASONS FOR DENYING THE WRIT

Nothing about this interlocutory decision is worthy of review by this Court. The Sixth Circuit simply determined that the district court did not abuse its discretion in making a preliminary determination, based on those facts then available, that Plaintiffs were likely to ultimately prevail.

The district court engaged in a preliminary, garden-variety exercise in contract interpretation. This dispute will ultimately require examination of CBAs going back three decades and the facts surrounding the negotiation and administration of those CBAs before there can be a final determination of the intent of the parties. Because CNH claimed below that it did not sign the CBA's, the ultimate resolution of this case will also require a detailed factual inquiry into Case's corporate history, Tenneco's 1994 reorganization and the operations of the entities involved.

These issues still to be decided, by definition, present fact-specific questions. The final outcome is not foreordained by the preliminary rulings of the courts below. Moreover, there is no conflict in the Circuits. The petition should be denied.

A. This Petition Involves an Interlocutory Appeal

This Court has long disfavored the grant of *certiorari* with respect to interlocutory decisions. *American Construction Co. v. Jacksonville T. & K.R. Co.,* 148 U.S. 372, 384 (1893);

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 258 (1916) (*certiorari* should be granted as to interlocutory decisions only in "extraordinary" cases).

As the cases cited by CNH in its parallel Petition illustrate, this Court has generally found interlocutory decisions "extraordinary" only when they involve fundamental constitutional rights. CNH Opp. 7-8.[4]

There is nothing extraordinary about this case. The district court issued a preliminary injunction requiring the continuation of health care coverage while the action below continues, as courts have often done. *See e.g. Steelworkers v. Textron, Inc.*, 836 F.2d 6 (1st Cir. 1986); *LaForest v. Former Clean Air Holding Co.*, 376 F.3d 48 (2d Cir. 2004); *Keffer v. H.K. Porter Co., Inc.*, 872 F.2d 60, 61 (4th Cir. 1989); *Steelworkers v. Connors Steel Co.*, 855 F.2d 1499, 1500 (11th Cir. 1988), *cert denied sub nom H.K. Porter Co., Inc., v. Steelworkers*, 489 U.S. 1096 (1989). As the Sixth Circuit noted below: "As the injunction issued by the district court is a preliminary injunction, the defendants may continue to press their arguments below . . . ." Pet. App. 20a. After a final decision is rendered, either party can then petition for a review of all issues that turn out to be, in fact, dispositive. *See Virginia Military Institute v. United States*, 508 U.S. 946 (1993).

B. There is No Split Among the Circuits

El Paso barely mentions the Sixth Circuit's interlocutory decision below in its arguments for *certiorari* review of that decision. As set forth above, the decision below is a routine decision affirming a preliminary injunction and therefore inappropriate for review by this Court. Putting this dispositive point aside, Plaintiffs show below that there is no

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[4] References to Plaintiffs' Opposition to CNH's Petition will be shown as "CNH Opp. _____."

split among the Circuits with respect to the analytical framework by which collectively bargained retiree health care disputes are decided.

El Paso canvasses dozens of Circuit decisions in an effort to show a substantive conflict. El Paso seizes on any factual similarity between a case in which an employer prevailed and one in which the employer did not and pronounces a conflict based on those results. As shown below, El Paso's "conflicts" evaporate on even a cursory review of the cases.

1. El Paso's Reading of Ten Outcome Determinative "Rules" Demonstrates Only That the Results Below are Dictated by the Unique Facts of Each Case

El Paso posits ten conflicting and outcome determinative "rules" it believes can be extracted from various Circuit decisions in retiree health care disputes over the last twenty-five years. Pet. 9-16, 18-21. In fact, as set forth in the Opposition to CNH Petition, the Circuits are in substantial agreement on the analytical approach in these cases.

The rules El Paso would read into various Circuit decisions involving retiree health care disputes are so numerous that repeating them would not be useful here, except to note that they involve: 1) consideration of extrinsic evidence; 2) whether the contractual analysis should begin with a presumption for or against vesting; and 3) whether certain specific words in a

CBA operate to vest benefits or not.[5] As we show below, there is no Circuit conflict on any of these points.

a. *The Circuits Agree on the Appropriate Application of the Extrinsic Evidence Rule*

El Paso asserts that the Circuits disagree about when extrinsic evidence can be admitted in retiree health care disputes. Pet. 9. To the contrary, the Circuits which have addressed this question have all recognized and applied the centuries-old rule that extrinsic evidence may be considered to resolve ambiguities in a written contract.[6] Because of the fact dependent

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[5] El Paso also argues that the Circuits disagree on how to analyze retiree plans that are not the product of collective bargaining. Pet. 13. This case involves a collectively bargained plan and is not, therefore, a vehicle for reviewing the analytical tools in examining unilaterally created benefit plans. Respondents note in passing, however, that unilateral plans—unlike collectively bargained plans—typically grant discretionary interpretive authority to the employer, resulting in arbitrary and capricious review of the employers' interpretation of plan language regarding vesting. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). In contrast, the typical retiree health care dispute arising out of collectively bargained plans is subject to de novo review.

[6] *See UAW v. Skinner Engine Co.*, 188 F.3d 130, 142-146 (3d Cir. 1999); *Machinists v. Masonite Corp.*, 122 F.3d 228, 233 (5th Cir. 1997) ("Because the agreements are ambiguous, the district court should have considered extrinsic evidence of intent"); *McCoy v. Meridian Automotive Systems, Inc.*, 390 F.3d 417, 422 (2004) ("When ambiguities exist . . . the court may examine extrinsic evidence of the parties' intent."); *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603, 609 (7th Cir.), *cert. denied*, 510 U.S. 909 (1993) (directing consideration of extrinsic evidence where contractual terms were inconclusive); *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1517 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989) ("[I]f the contract is deemed ambiguous, then the court may weigh extrinsic circumstances to aid in its construction," *quoting Local 150-A, Food & Commercial Workers v. Dubuque Packing Co.*, 756 F.2d 66, 69 (8th Cir 1985) with approval); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224 (9th Cir. 1984); *Stewart v. KHD Deutz of America, Corp.*, 980 F.2d 698, 702 (11th Cir. 1993) ("Once it is established that the contract is ambiguous, . . . extrinsic evidence is admissible to explain that ambiguity").

nature of these cases, courts have almost always found it necessary to examine extrinsic evidence to determine whether the parties to a CBA intended to establish vested benefits.[7] In unusual cases courts have found that written language unambiguously promises retirees vested health care,[8] or clearly does not.[9] There is simply no disagreement on the application of this fundamental principle.

El Paso asserts that the Third Circuit, in *UAW v. Skiner Engine Co.*, 188 F.3d 130 (3d Cir. 1999), held that the traditional extrinsic evidence rule does not apply in retiree health care disputes. Pet. 9. In fact, the *Skinner* panel explicitly confirmed that it *does* apply. The court stated that a contract clause is ambiguous when it is subject to reasonable alternative interpretations and that "[r]eference must often be made to the 'contract language, the meanings suggested by counsel, and the extrinsic evidence offered in support of each interpretation.'" 188 F.3d at 142, *quoting Teamsters Welfare Fund v. Rolls-Royce Motor Cars Inc.*, 989 F.2d 132, 133 (3d Cir. 1993). The *Skinner* court found the retiree health care "will continue" language presented in that case unambiguous, however, only after examining prior contracts that indicated the "will continue" language did not address duration, but whether there had been a change in benefits from the previous contract. 188 F.3d at 142-143. In fact, in *Skinner*, the court

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[7] See *Keffer v. H.K. Porter Co., Inc.*, 872 F.2d 60, 64 (4th Cir. 1989); *Machinists v. Masonite Corp.*, 122 F.3d at 233; *Paperworkers v. Champion International Corp.*, 908 F.2d 1252, 1261 (5th Cir. 1990); *Bidlack v. Wheelabrator Corp.*, 993 F.2d at 609-610 ; *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 546-547 (7th Cir. 2000); *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1518 (8th Cir. 1988), *cert. denied sub nom Anderson v. Slattery Group, Inc.*, 489 U.S. 1051 (1989); *Stewart v. KHD Deutz of America, Corp.* 980 F. 2d at 703.

[8] See *Steelworkers v Connors Steel Co.*, 855 F.2d 1499, 1504 (11th Cir. 1988); *Diehl v. Twin Disc, Inc.*, 102 F.3d 301, 307 (7th Cir. 1996).

[9] See *Barnett v. Ameren Corp.*, 436 F.3d 830, 835 (7th Cir. 2006); *Cherry v. Auburn Gear, Inc.*, 441 F.3d 476, 483-486 (7th Cir. 2006).

stated that extrinsic evidence could have changed the result. Thus, the court stated that the "out-come of this case would no doubt be different" if the company's former CEO had testified that, in agreeing to include the phrases "will continue" and "shall remain" in the CBA, the company intended that language to mean that retiree benefits were vested. *Id.* at 147. See also *infra* at 14-15, and CNH Opp. 16.

b. *The Circuits Agree That No Automatic Presumptions Apply*

El Paso next argues that the Circuits disagree as to whether an automatic presumption for or against vesting should be applied in resolving retiree health care disputes. This issue has long been laid to rest. All Circuits to address the issue agree that no automatic presumption should apply.[10] El Paso nevertheless argues that the Seventh Circuit applies an automatic presumption that retiree health care benefits are not vested and that the Sixth Circuit applies a presumption that benefits are vested. Pet. 11. As the Circuit decisions show, neither assertion is correct.

In the Seventh Circuit, as Judge Posner observed in *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539, 544 (7th Cir. 2000), *cert. denied*, 531 U.S. 1192 (2001), a presumption would arise only in the atypical situation where a contract contains *no* language that could reasonably be construed to vest retiree benefits:

> Our presumption against vesting, it is important to emphasize, kicks in only if all the court has to go on is

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[10] *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907, 917 (6th Cir, 2000) (no presumption for vesting); *Machinists v. Masonite Corp.*, 122 F.3d 228, 231 (5th Cir. 1997) (no presumption against vesting); *Senior v. NSTAR Electric & Gas Corp.*, 449 F. 3d 206, 217 (1st Cir. 2006)(no presumption for or against vesting); *Rosetto v. Pabst Brewing Co.*, 217 F.3d 539, 544 (7th Cir. 2000)(same); *Bazzone v. Automotive Industries Welfare Fund*, 860 F.2d 1088, 1988 WL 58340 *4 (9th Cir. 1988) (unreported decision)(recognizing *Yard-Man* does not create a presumption)

> silence. . . . The presumption is thus a default rule, that is, a rule to be applied when there is no other evidence.

Similarly, since it decided *UAW v. Yard-Man Inc.*, 716 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984), the Sixth Circuit has repeatedly stated that it does not apply any presumption in favor of vesting. As the Sixth Circuit stated below:

> El Paso and CNH America misinterpret the term "inference" and confuse it with a legal presumption. Under *Yard-Man* we may *infer* an intent to vest from the context and already sufficient evidence of such intent. Absent such other evidence, we do not start our analysis presuming anything. . . . "[t]here is no legal presumption that benefits vest and that the burden of proof rests on plaintiffs." *Maurer*, 212 F.3d at 917. This Court has never inferred an intent to vest in the absence of either explicit contractual language or extrinsic evidence indicating such an intent. Rather, the inference functions more to provide a contextual understanding about the nature of labor-management negotiations over retiree benefits.

Pet. App. 12a.

Although the Third Circuit in its 1999 *Skinner* decision phrased the Sixth Circuit's position on this issue in terms of a presumption, 188 F.3d at 140 ("We cannot agree with *Yard-Man* that there exists a presumption of lifetime benefits . . ."), there is no longer any doubt that the Sixth Circuit *does not* apply a presumption. The Sixth Circuit has emphasized that no presumption applies three times since *Skinner* was decided —in the decision below, in *Maurer v. Joy Technologies, Inc.*, 212 F.3d 907, 917 (6th Cir, 2000) and in *McCoy v. Meridian Automotive Systems, Inc.*, 390 F.3d 417, 422 (6th Cir. 2004).[11]

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[11] El Paso argues that there is some confusion on this question within the Sixth Circuit by noting that the word "presumption" appears in *UAW*

The First Circuit recognized the settled state of Sixth Circuit law on this question in *Senior v. NSTAR Electric & Gas Corp.*, 449 F. 3d 206, 217 (1st Cir. 2006). It rejected plaintiff's claim that *Yard-Man* created a presumption in favor of vesting, noting that: "In *Yolton*, 435 F.3d 571[(6th Cir. 2006)], the court said: 'All that *Yard-Man* and subsequent cases instruct is that the court should apply ordinary principles of contract interpretation. *Id.* at 580.'"

The *Yard-Man* inference is simply one tool among many used to interpret CBAs.[12] As the Sixth Circuit explained in *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir.), *cert. denied*, 519 U.S. 807 (1996):

> the *Yard-Man* inference, and the other teachings of the opinion regarding contract interpretation and the consideration of extrinsic evidence, simply guide courts faced with the task of discerning the intent of the parties from vague or ambiguous CBAs.

c. *The Effect of Specific Words or Phrases*

Finally, El Paso attempts to articulate a Circuit conflict by asserting that cases El Paso characterizes as having identical

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v. BVR Liquidating, Inc., 190 F.3d 768 (6th Cir. 1999). That reference, however, appeared in the court's characterization of a party's argument, not in the panel's articulation of the *Yard-Man* decision. The panel itself clearly stated that *Yard-Man* permitted an "inference," and that "*Yard-Man* does not shift the burden of proof to the employer." 190 F.3d at 772, *quoting Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 656 (6th Cir. 1996), which in turn quoted *UAW v. Cadillac Malleable Iron Co.*, 728 F.2d 807, 808 (6th Cir. 1984), for the proposition that "there is no legal presumption based on the status of retired employees."

[12] In any case, neither the district court nor the Sixth Circuit relied on the *Yard-Man* inference. The Sixth Circuit noted that, while the district court mentioned the inference, its "analysis does not in any sense *rely* on an inference. . . . Instead, the district court interpreted the language of the agreement and found evidence that the defendants intended to confer lifetime benefits upon the plaintiffs." Pet. App. 14a. (emphasis in original).

retiree health care provisions were decided differently by different Circuits. Pet. 18-21. The cited cases actually involve quite different language in different contexts. They are not at all in conflict.

i. El Paso's "Will Continue" Argument

El Paso first argues that Circuits differ on whether the words "will continue" automatically vest benefits. The answer from the Circuits, not surprisingly, is that it depends on the factual context. El Paso argues that the Sixth Circuit's decision in *UAW v. BVR Liquidating, Inc.*, 190 F.3d 768 (6th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000), the Third Circuit's decision in *Skinner*, the Seventh Circuit's decision in *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992), *cert. denied*, 509 U.S. 903 (1993) and the Eleventh Circuit's decision in *Stewart v. KHD Deutz of America, Corp.*, 980 F.2d 698 (11th Cir. 1993), all adopted conflicting rules with respect to the same retiree health care provisions. A cursory review of the cases shows that the language examined in each of the cases was dramatically different.

In *BVR Liquidating*, the company had agreed, in a prior contract, that retiree health care benefits would be paid for retirees "until death," that is, that the coverage would not continue for surviving spouses after the retiree's death. A subsequent contract expanded the coverage to include surviving spouses and therefore the prior language that terminated coverage at the retiree's death was removed. 190 F.3d at 770 n. 5. The new, more expansive provision stated that the retirees would have coverages "continued for themselves, their spouses, surviving spouses, and eligible dependents." *Id.* After examining the entire contract, including durational clauses, the Sixth Circuit found the language ambiguous, reviewed extrinsic evidence and concluded that the benefits were vested. *Id.* at 774-775.

In *Skinner*, a CBA provided that the company "will continue to provide" medical coverage. 188 F.3d at 135. The

Third Circuit noted, however, that this language had been changed from contract to contract depending on whether the new contract continued previous coverage or changed the previous coverage. If the latter, the contract contained "will be instituted," for example, rather than "will continue." The Third Circuit found, based on this history, that "will continue" referred to whether there had been a change in coverage, not to duration. 188 F.3d at 142-143. The Third Circuit also relied on the fact that the retiree health care language did not specifically mention retirees at all:

> the CBA provisions make no material distinction between active employees and retirees in this regard. The only reasonable conclusion—if one begins with the uncontroversial premise that benefits for active employees were not vested—is that benefits for retirees were likewise not vested.

Id. at 144.

After examining other parts of the CBA and, as noted above, extrinsic evidence, the Third Circuit in *Skinner* determined that the contract provisions were not ambiguous and held, based on the particular facts described above, that the benefits were not vested. *Id.* at 147.

El Paso claims that the Seventh Circuit in *Senn* applied yet a third outcome-determinative rule to "will continue" contract language. In fact, as the Seventh Circuit later pointed out in *Bidlack v. Wheelabrator*, 993 F.3d at 608, the language in *Senn* did not merely say that retiree benefits "will continue:"

> The language in *Senn* was weaker: it was that the company "will continue for retired employees" a specified premium contribution. And the final agreement between the company and the union in that case, which could be thought declaratory of earlier understandings, said that coverage "shall be continued *during the term of this agreement.*"

The other case cited by El Paso in support of its "will continue" argument, *Stewart v. KHD Deutz of America, Inc.*, 980 F.2d 698 (11th Cir. 1988), did not involve "will continue" language at all. Rather, the contract provided that coverage "shall be provided . . . during retirement." 980 F.2d at 701-702. Because the contract also contained a reservation of rights clause, the Eleventh Circuit found it ambiguous and remanded for consideration of extrinsic evidence. *Id.* at 703-704.

As the Circuit decisions cited by El Paso above show, neither the Sixth Circuit, in *BVR Liquidating*, nor the Third, Seventh or Eleventh Circuits based their decisions on a myopic reading of a two-word phrase such as "will continue." Rather, all the Circuits to address collectively bargained retiree health care disputes have applied traditional rules of contract interpretation to the unique facts of each case.[13]

ii. El Paso's Pension Linkage Argument

El Paso next asserts that two Sixth Circuit decisions, *Golden v. Kelsey-Hayes, supra*, and *McCoy v. Meridian Automotive Systems, supra*, were decided differently than two decisions El Paso claims had identical governing documents —the Second Circuit's decision in *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130 (2d Cir. 1999) and the Seventh Circuit's decision in *Vallone v. CNA Financial Corp.*, 375 F.3d 623 (7th Cir.), *cert. denied*, 543 U.S. 1021 (2004).

Again, a review of the facts shows that these decisions turned on very different written provisions. The decisions are not at all inconsistent.

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[13] See CNH Opp. 13-20.

In *Golden*, the court articulated—as one factor[14]—that the CBA provided that retirees were eligible for health care benefits if they were eligible for a company pension. 73 F.3d at 656. The court in *McCoy* addressed similar provisions—and additional extrinsic evidence—and reached the same result. 390 F.3d at 423-424.

In *Joyce* and *Vallone*, the courts rejected vesting claims because explicit reservation of rights clauses gave the employers the right to modify their benefits. In *Joyce*, the Second Circuit rejected a vesting argument where a summary plan description given to retirees specifically stated that their retiree medical benefits "are of a contractual nature, and they may be modified from time to time or terminated as a result of contractual negotiations."[15] 171 F.3d at 132. In *Vallone*, the Seventh Circuit examined a plan unilaterally promulgated by the employer. The plan documents contained a reservation of rights provision which stated that the retiree coverages "may be amended, revoked, or suspended at the Company's discretion at any time, even after your retirement." 375 F.3d at 636.[16]

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[14] The Sixth Circuit in *Golden* also relied on many other facts as well, including language in the SPDs and the fact that the company continued to provide retiree health care long after it sold the facilities in question. *Golden*, 73 F.3d at 656-57. The district court subsequently found a "veritable mountain of evidence" to support its finding that retiree health care benefits had vested. *Golden v. Kelsey-Hayes Co.*, 954 F. Supp. 1173, 1187-88 (E.D. Mich. 1997).

[15] See *Joyce v. Curtis-Wright Corp.*, 992 F. Supp. 259, 263-263 (W.D. N.Y. 1997), setting forth factual details.

[16] The Seventh Circuit's *Vallone* decision was also based on the court's finding that the plan documents granted the company discretion in interpreting the plan, and that the company's interpretation must therefore be upheld unless it was arbitrary and capricious, as held in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989). 375 F.3d at 631-632. This grant of discretion is typical of unilaterally-promulgated benefit plans and rare in collectively bargained plans. Collectively bargained

iii. El Paso's Durational Clause Argument

El Paso notes that an Eighth Circuit case interpreted a durational clause as being inconsistent with vesting, and argues that this decision is inconsistent with the Sixth Circuit's determination in the decision below that a general durational clause in the Case CBAs did not preclude vesting. Pet. 20-21. The two decisions are not at all inconsistent. In *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512 (8th Cir. 1987), cited by El Paso, the CBA specifically provided that *retiree* insurance coverage could be "amended, modified or supplemented in collective bargaining between the parties." The Eighth Circuit therefore decided those benefits could be modified. 836 F.2d at 1514-1515. The general durational clause examined by the Sixth Circuit below is dramatically different. That clause merely provides that the insurance plan would run concurrently with the CBA. Unlike the durational clause in *Anderson*, the general durational clause examined by the courts below does not mention retirees and contains no statement that retiree benefits could be modified by subsequent negotiations. Pet. App. 13a-14a. It is simply not possible to conjure a conflict between the decision below and the Eighth Circuit's decision in *Anderson*.

2. Retiree Claims are Frequently Rejected Within the Sixth Circuit and Frequently Prevail in Other Circuits

El Paso seeks to extract outcome-determinative rules from a variety of factually distinct cases. As shown above, the Circuits have not applied any such rules, but have applied traditional rules of contract interpretation to widely disparate factual situations. The absence of any outcome-determinative

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retiree disputes, therefore, are typically reviewed under a de novo standard under which the employer and retiree interpretations of applicable retiree health care provisions are entitled to equal weight.

rules is further demonstrated by noting that retirees frequently fail in the Sixth Circuit[17] and frequently prevail in other Circuits.[18]

El Paso argues that a substantive split must exist because retirees have prevailed more often in Sixth Circuit decisions than in Seventh Circuit decisions. Pet. 15 n.5. As the cases cited by El Paso in support of this argument show, however, a majority of the Sixth Circuit cases, due to geographical realities, arose out of auto industry contracts, with their own distinct patterns and history.[19] In contrast the Seventh Circuit cases arise out of a more diverse group of industries—brewery,[20] electrical,[21] steel,[22] and

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[17] *See e.g. UAW v. Cleveland Gear Corp.*, 1983 WL 2174 (N.D. Ohio 1983), *aff'd* 1984 U.S. App. LEXIS 13700 (6th Cir. 1984) (unpublished opinion); *Bittinger v. Tecumseh Products Co.*, 83 F. Supp.2d 851 (E.D. Mich. 1998), *aff'd* 201 F.3d 400 (6th Cir. 1999); *Maurer v. Joy Technologies,Inc.*, 212 F.3d 907, 919 (6th Cir. 2000)(summary judgment against certain retirees); *UAW v. Roblin Industries, Inc.*, 561 F. Supp. 288 (W.D. Mich. 1983).

[18] *See e.g. Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90 (2d Cir. 2001); *Diehl v. Twin Disc, Inc.*, 102 F.3d 301 (7th Cir. 1996); *Rossetto v. Pabst Brewing Co., Inc.* 217 F.3d 539, (7th Cir. 2000); *Chiles v. Ceridian Corp.* 95 F.3d 1505 (10th Cir. 1996) and *Stewart v. KHD Deutz of America, Inc.*, 980 F.2d 698 (11th Cir. 1993).

[19] *See e.g. UAW v. Cleveland Gear Corp.*, 1983 WL 2174 (N.D. Ohio 1983), *aff'd* 1984 U.S. App. LEXIS 13700 (6th Cir. 1984) (unpublished opinion); *Bittinger v. Tecumseh Products Co.*, 83 F. Supp.2d 851 (E.D. Mich. 1998), *aff'd* 201 F.3d 400 (6th Cir. 1999); *Maurer v. Joy Technologies,Inc.*, 212 F.3d 907, 919 (6th Cir. 2000)(summary judgment against certain retirees); *UAW v. Roblin Industries, Inc.*, 561 F. Supp. 288 (W.D. Mich. 1983).

[20] *See Zielinski v. Pabst Brewing Co.*, __ F.3d __, 2006 WL 2567468 (7th Cir. 2006); *Rossetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000); *Pabst Brewing Co. v. Corrao*, 161 F.3d 434 (7th Cir. 1998).

[21] *Barnett v. Ameren Corp.*, 436 F.3d 830 (7th Cir. 2006).

[22] *Murphy v. Keystone Steel & Wire Co.*, 61 F.3d 560 (7th Cir. 1995); *Senn v. United Dominion Industries, Inc.*, 951 F.2d 806 (7th Cir. 1992).

auto,[23] each with its own pattern and history. The difference in results reflects the differences in the industry contracts, not any substantive difference in the applicable legal standards.

C. The Sixth Circuit's Preliminary Decision Raises No Issues of Importance and Does Not Conflict With Any Federal Policy

El Paso argues that crucial issues of national importance are at stake in this case. Pet. 21-25. But, as described above, and in Plaintiffs' Brief in Opposition to CNH's Petition, the decision below was a routine preliminary injunction decision which applied ordinary, hornbook principles of contract construction.[24]

El Paso's assertion rests on its claim that different Circuits have applied conflicting outcome-determinative rules. As shown above and in the CNH Opposition Brief, however, all Circuits are in agreement on the traditional rules of contract construction to be applied in resolving collectively bargained retiree health care disputes wherever they arise.

El Paso proposes, in effect, that all courts should abandon traditional contractual analysis, which seeks to determine the intent of the parties to CBAs, and instead adopt an outcome-determinative rule regardless of what the evidence as to the parties' intent actually is.[25] El Paso cites *Litton Financial*

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[23] *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993); *Diehl v. Twin Disc., Inc.*, 102 F.3d 301 (7th Cir. 1996); and *Cherry v. Auburn Gear, Inc.*, 441 F.3d 476 (7th Cir. 2006).

[24] El Paso, like CNH, claims that the alleged "conflict" exacerbates the "evil of forum shopping." Pet. 24-25. Putting aside the fact that Plaintiffs, UAW, its witnesses and voluminous documents are within the forum chosen, El Paso, like CNH, never before complained about the venue which it acknowledges was properly selected by Plaintiffs.

[25] El Paso also cites this court's decision in *Allis-Chalmers Corp. v Lueck*, 471 U.S. 202 (1985), which held that federal law, rather than state, applies to disputes arising out of collective bargaining agreements. That

Printing v. *N.L.R.B.*, 501 U.S. 190 (1991) in support of this proposal. Pet. 9-10. The *Litton* decision, to the contrary, endorses the traditional approach to contractual interpretation adopted by the Circuits in retiree health care cases arising under a CBA. *Litton* addressed the question of whether a dispute (unrelated to retiree health care) which arose after the termination of a CBA was arbitrable under that agreement's grievance procedure. In *Litton,* the Court stated that whether rights continue beyond the termination of a CBA is "determined by contract interpretation. Rights which accrued or vested under the agreement, will, as a general rule, survive termination of the agreement." 501 U.S. at 207.

All Circuits are in accord.

CONCLUSION

For the reasons set forth above, El Paso's request for review should be denied.

Respectfully submitted,

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proposition is uniformly accepted by all Circuits and the company does not attempt to show otherwise.